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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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NO. 48654-7-II

**COURT OF APPEALS STATE OF WASHINGTON**

**DIVISION II**

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**MARVIN OLSEN and YONG IM OLSEN, husband and wife, Appellants,**

**v.**

**H. GARY WALLIS and MONIQUE A. WALIS, individually and the marital community  
comprised thereof**

**Respondents.**

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**BRIEF OF RESPONDENTS**

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**Christopher M. Huss, WSBA #6186  
4224 Waller Road E.  
Tacoma, WA 98443**

**Attorney for Respondents**

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## **I. INTRODUCTION**

Plaintiffs Marvin Olsen and Yong Im Olsen appeal the trial court's entry of an Order Confirming Arbitration Award and Final Judgment substantially in favor of defendants H. Gary Wallis and Monique A. Wallis. Plaintiffs' claims relate to two adjacent parcels of real property in Lakewood, Washington; an office building used by the parties as their law office and a single family residence across the alley from the law office used by the parties as a rental. From time the law partnership of the parties terminated in 2000 upon plaintiff Marvin Olsen's disbarment by order of the Washington Supreme Court until December 2012 when the underlying complaint was filed. Defendant H. Gary Wallis used the office building as his law offices and managed the residential real property. Plaintiffs asserted claims under the partition statute and entitlement to unpaid rental income and defendants answered claiming title by adverse possession and abandonment.

The parties agreed to arbitrate all issues and stipulated to the appointment of attorney John Miller as arbitrator. Following a one day arbitration hearing in August 2015, the arbitrator entered his award, followed by a supplemental clarification of award. CP 18-21.

The trial court correctly entered an Order Confirming Arbitration Award and Final Judgment thereon upon motion of defendants. Plaintiffs appeal the confirmation order and judgment alleging that it was “facially, grossly, and fundamentally unfair or arbitrary and capricious”. Appellants’ brief is little more than an attempt to relitigate the issues raised by the parties’ pleadings contrary to the well-established and clear policy in the State of Washington favoring the finality of arbitration awards and severely limiting review of such award.

## **II. COUNTER-STATEMENT OF THE CASE**

### **A. Factual Background**

Plaintiff and defendant formed a law partnership in Lakewood, Washington in 1976. They conducted their practice from a single story office building owned by Appellant prior to admitting defendant to the practice. Plaintiff also owned a single family residence adjacent to the office building. In 1978 Plaintiff sold defendant an undivided one-half interest in both buildings. CP 18-20.

The parties continued practicing law in the office building until 1999 when an investigation by the Washington State Bar Association led to plaintiff’s 2000 disbarment from the practice of

law. Defendant was also reprimanded by the Bar for his failure to properly monitor the fund's trust account in connection with the events leading to plaintiff's disbarment. Upon his disbarment plaintiff vacated the office building and for the next 12 years defendant continued to conduct his law practice from the building, paying all expenses of its operation including real property taxes, insurance, repairs and maintenance. In addition, defendant paid off a mortgage placed on the building by plaintiff before his disbarment. Plaintiff had extremely minimal contact with defendant during the next 12 years and made no contribution to the expenses of either building. CP 18-20.

#### **B. Procedural Background**

After remaining silent for over 12 years, plaintiff brought this action against defendant in December 2012 seeking, *inter alia*, partition of the two parcels of real estate, a monetary judgment for one half of the rental value of the property for the past 12 years, prejudgment interest and attorney fees. CP 1-4. Defendant answered plaintiff's complaint asserting, *inter alia*, that plaintiff had effectively abandoned his interest in the properties; that defendant had acquired plaintiff's undivided one-half interest in the property under the doctrine of adverse possession and that title should be quieted in him; that the action was barred by the applicable statute

of limitations and the doctrine of laches, and, alternatively, that defendant was entitled to an offset for the 12 years of the property expenses and mortgage payments he had paid over that time period. CP 7-10.

In October 2014, after several continuances of the trial date, the parties stipulated to arbitration of their disputes before retired Judge Bruce Cohoe. CP 13-14. Upon Ret. Judge Cohoe's recusal, the parties agreed to employ attorney John Miller to arbitrate the case. CP 64-65.

Arbitrator Miller conducted a one day hearing on August 25, 2015 and filed his Arbitration Decision/Award on September 23, 2015. CP 18-21. On defendant's Motion for Clarification the arbitrator filed a Decision on Motion for Modification and/or Clarification on November 15, 2015. CP 58-59. On defendant's Motion to Confirm Arbitration Award the trial court entered an Order Confirming Arbitration Award on January 29, 2016, CP 94-95, and judgment was entered thereon on February 25, 2016. CP 96-98. This appeal ensued. CP 99-104.



### III. ARGUMENT

#### A. Standard of Review

As the court stated at the outset of its decision in *Cummings v. Budget Tank Removal & Environmental Services LLC*, 163 Wn. App. 379, 260 P.3d 220 at 223 (2011) “Rarely is it possible to have an arbitration award vacated for error on the face of the award . . . . “ The purpose of arbitration is to avoid the courts and is designed to settle controversies, not to serve as a prelude to litigation. *Westmark Properties Incorporated v. McGuire*, 53 Wn. App. 400, 766 P.2d 1146 (1989). The strong policy of Washington’s arbitration act, RCW 7.04A, formerly codified as RCW 7.04, is to confer finality on arbitrator’s awards. *Davidson v. Hensen, et.al.* 135 Wn.2d 112, 954 P.2d 1327 (1998).

The court’s review of an arbitrator’s award is confined to the question whether statutory grounds for vacation of the award exist and the burden of establishing the existence of such grounds is on the party seeking to vacate the award. *Cummings v. Budget Tank Removal & Environmental Services LLC*, 163 Wn. App. 379, 260 P.3d 220 (2011), citing *Pegasus Const. Corp. v. Turner Const. Co.*, 84 Wn. App. 744, 747-48, 929 P.2d 1200 (1997). This court’s review is limited to that of the trial court which confirmed, modified or corrected the award. *Cummings v. Budget Tank Removal &*

*Environmental Services LLC*, 163 Wn. App. 379, 260 P.3d 220, 226 (2011).

Judicial review is limited to the inquiry whether there exists any of the statutory grounds for vacation of an award set forth in RCW 7.04A.230. *Salewski v. Pilchuk Veterinary Hospital, Inc., PS*, 189 Wn. App. 898, 359 P.3d 884 (2015). The error, if any, must appear on the face of the award. *Federated Servs. Ins. Co. v. Personal Representative of Estate of Norberg*, 101 Wn App. 119, 4 P.3d 844 (2000); *Westmark, supra* at 1147. The term “award” is to be narrowly construed and essentially consists only of the specific resolution of the issues submitted. The evidence before the arbitrator should not be considered and gratuitous statements constituting the reasons for the award are not part of the award. *See Westmark*, 53 Wn. App. 400 at 401.

#### **B. No Basis for Vacation of Award**

The pleadings in this case presented several complex legal and factual issues for the arbitrator to resolve. CP 1-4, and CP 7-10. The ultimate legal issues consisted of the resolution of title to the real property and the allocation of financial responsibility for rent and property expenses during the parties’ period of common ownership. The plaintiff sought to partition the two parcels of

property and defendant asserted that title had already passed to him on the theories of abandonment, adverse possession and laches. Both parties also sought compensating money judgments for unpaid rent or unequal contribution of property debt and expenses. The arbitrator was designated the trier of fact and law by virtue of his appointment through the stipulation of the parties to resolve all disputes in the case via binding arbitration. CP 13-14.

Partition under RCW 7.52.010 *et.seq.* is a statutory remedy available to tenants in common who no longer wish to continue in common ownership of property. A partition action is both a right and flexible equitable remedy subject to judicial discretion. *Friend v. Friend*, 92 Wn. App. 799, 964 P.2d 1219 (1998). The trial court is given great flexibility in fashioning relief under its equitable powers. *Friend*, at 801 (citing *Cummings v. Anderson*, 94 Wash.2d 135, 143, 614 P.2d 1283 (1980)). The arbitrator invoked these flexible equitable powers in fashioning relief in this case. Cases of this nature in general, and this case in particular involves a complex and confusing factual situation with competing equities to balance. It was within the issues raised by the pleadings and the provisions of the partition statute for the arbitrator to quiet title to the office building in the defendant with a compensating lien for post 2012 rent in favor of plaintiff and to continue the equal ownership of the

rental with a compensating judgment in favor of plaintiff to balance prior rental and expenses. *See Yakavonis v. Tilton*, 93 Wash. App. 304, 968 P.2d 908 (1998). In making such award the arbitrator did not exceed his power within the meaning of RCW 7.04A.230 (d) nor commit facial error in the issuance of his award. The arbitrator fully performed his assigned duties and resolved all issues between the parties as raised by the pleadings.

Appellant spends pages and pages of his brief in an attempt to establish the fundamental unfairness of the arbitrator's award. Appellant's Brief 5-18. He is asking this court to review and evaluate the minute details of the award as if they constituted findings of fact and conclusions of law that can be challenged through Assignments of Error. As stated by the court in *Westmark v. McGuire*, supra at 401" (T)his approach reflects a misconception of arbitration and the role of the court in the process." When acting under the broad authority granted them by the parties and the statute arbitrators become the judges of both the law and the facts and unless the resulting award shows the adoption of an erroneous rule on its face neither the trial court should not vacate or modify the award. *Thorgaard Plumbing & Heating Co. v. County of King*, 71Wn.2d 126 at 131, 426 P.2d 828 (1967).

### **C. Claims for Prejudgment Interest and Attorney's Fees**

Plaintiff asserts the arbitrator wrongfully failed to award him prejudgment interest in addition to his award for back rental on both the office building and the single family residence. Appellant's Brief 16. He relies on the statements of the court in *Hyundai v. Magana*, 141 Wn. App. 495, 170 P.3d 1165 (2007) to the effect that prejudgment interest is appropriate when a claim is liquidated or readily determinable. The monetary claims of the plaintiff in this case were certainly not liquidated or readily determinable. The applicable rental value of the office building was matter of dispute between the parties and the net rental value of the single family residence was likewise dependent on a determination of the amounts paid and expenses incurred. The failure to award prejudgment interest is reviewable under the "abuse of discretion standard". *Colonial Imports v. Carlton N.W., Inc.*, 83 Wn. App. 229, 921 P.2d 575 (1996). Plaintiff has failed to establish entitlement to prejudgment interest as a matter of law and has certainly not established that the arbitrator abused his discretion in failing to award such interest or that the abuse, if any, is apparent on the face of the award.

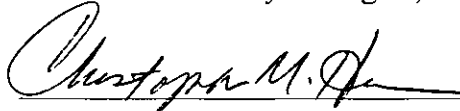
Plaintiff's claim for attorney's fees is dependent on RCW 7.28.083 (3) which authorizes the court to award fees to a party in

an adverse possession claim if “after considering all the facts, the court determines an award is just and equitable.” Again, the standard of review of this provision is the “abuse of discretion” standard and plaintiff has offered no evidence to support an abuse of discretion in this regard nor established that such abuse, if any, appeared on the face of the award.

#### IV. CONCLUSION

Plaintiff has failed to raise any issues reviewable by this court on the face of the award. Even if the court finds facial error within the award the appropriate remedy would not be the vacation of the award but remand to the arbitrator to clarify and/or correct the award as appropriate. This court should follow the strong policy favoring the finality of arbitration proceedings and refuse Appellant’s invitation to look beyond the face of the award and substitute its judgment for that of the arbitrator. Despite plaintiff’s request to do so the trial court declined this invitation and this court should do the same and reject this appeal, awarding costs to Respondent pursuant to RAP 14.1 et. seq.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of August, 2016.

A handwritten signature in black ink, appearing to read "Christopher M. Huss", written over a horizontal line.

Christopher M. Huss WSBA 6186  
Attorney for Respondents

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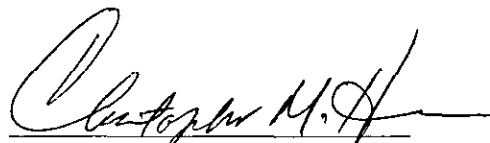
Respondents.

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**CERTIFICATE OF SERVICE  
OF RESPONDENTS' BRIEF**

I, Christopher M. Huss, attorney for Respondents, certify that on the 19<sup>th</sup> day of August, 2016 I caused a true and correct copy of Respondents' Brief to be served on Donald N. Powell, 818 S. Yakima, First Floor, Tacoma, WA 98405. Email: [taclaw@harbornet.com](mailto:taclaw@harbornet.com) by email pursuant to our agreement to serve and accept service by email in this matter.

DATED this 19th day of August, 2016.



Christopher M. Huss WSBA #6186

Attorney for Respondents

H. Gary Wallis and Monique A. Wallis